Statutes Cited.

Other Authorities Cited.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 932

LOUIS H. PINK, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK,

Petitioner,

vs.

A. A. A. HIGHWAY EXPRESS, INC.; H. A. ADAMS, TRADING AS ADAMS TRANSFER CO.; H. L. BASS, AS BASS BUS LINE; SERVICE COACH LINE, INC.; EAST & WEST MOTOR LINES, ROY R. REAGIN, GEORGIA MOTOR EXPRESS, INC., S. S. SALE, SALE TRANSFER CO., SOUTH EASTERN STAGES, INC., EVERREADY CAB COMPANY, J. H. BOOKER, D/B/A SAVANNAH BEACH LINE AND/OR ATLANTIC STAGES; FLETCHER T. KAYLOR, D/B/A KAYLOR TRANSFER CO.; J. F. MURRAY, D/B/A GEORGIA ALABAMA COACH LINE; KALER PRODUCE COMPANY, COX BROS. UNDERTAKING CO., INC., ATLANTA MACON MOTOR EXPRESS, INC., SOUTHEASTERN MOTOR LINES, INC., AND/OR CEDARTOWN BUS LINE, J. RUSSELL, D/B/A RUSSELL TRANSFER CO., CONTINENTAL CARRIERS, INC., BATEMAN COMPANY, INC., DOWNIE BROTHERS CIRCUS, KINNETT ODOM COMPANY, INC., SOUTHERN STAGES, INC., WEATHERS BROS. TRANSFER CO., INC., M. & A. MOTOR FREIGHT LINES, INC.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA AND BRIEF IN SUPPORT THEREOF.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

This is a petition for a writ of certiorari to the Supreme Court of the State of Georgia, to review a decision of the

Supreme Court of the State of Georgia, dated January 16, 1941 (adhered to on rehearing February 14, 1941), affirming a final judgment of the Superior Court of Fulton County, Georgia, which dismissed, with opinion (R. 80-81), the bill in equity brought by petitioner against the respondents herein.

I.

Summary Statement of Matter Involved.

Petitioner is the Superintendent of Insurance of the State of New York and statutory successor of insolvent insurance corporations chartered in that State. On the 13th day of October, 1939, he filed a bill in equity in the Superior Court of Fulton County, naming as defendants certain individuals and corporations, alleging them to be members and policy holders of Auto Mutual Indemnity Company.

He alleged that the Company, by its charter, was authorized to issue casualty policies on a mutual plan only; that the applicable statutes of New York contained mandatory provisions confining membership of the corporation to its policyholders; that mutual insurance companies of this character must provide in their charters and by-laws for the levy of an assessment in case of deficiency of assets, and that every member is obligated to pay assessments not exceeding twice the amount of his annual premium, upon receiving notice thereof.

He alleged further that after the Company had been taken over for liquidation under a judgment of the New York Supreme Court, his recommendation for the levy of a 40% assessment against all members and policyholders had been approved by the court; that thereafter he had computed the amounts due by each member, including the Georgia defendants, also other indebtedness due for premiums.

His second report containing a computation of the amount due by each defendant under the assessment and other in-

debtedness due was filed in the case and on November 18, 1938 a Justice of the Supreme Court of New York entered a decree finding that notice had been mailed to the last known address of the members shown on the books of the insurer and newspaper publication had also been made, all as provided for in the statutes of New York dealing with the liquidation of insolvent mutual insurance companies, and approving the correctness of the reports aforesaid (R. 38).

Relevant sections of New York law covering the liquidation of insolvent insurance companies and assessments therein were attached as exhibits to the pleadings (Amendment of July 25, 1940, R. 18-44 inclusive and Amendment of Aug. 14, 1940, R. 44-46). The charter (Article 4) provided that "the members of the corporation shall be the policyholders therein." And in the same pleadings (Amendment of July 25, 1940, R. 22-23) petitioner alleged the law of New York to be:

> "It is the law of New York that every person who accepts a policy of insurance in a mutual insurance company thereby becomes a member thereof. * * *
>
> "It is the law of New York that the aforesaid section 346 compels the Company to fix the contingent mutual liability of the members; and that failure to mention the liability to assessment in the policies or by-laws does not release policyholders from liability to assessment, but results in their liability being fixed in accordance with Section 346 of the New York Insurance Law. * * *
>
> "It is the law of New York that the laws of that state govern the rights, liabilities and duties on liquidation of policyholders in mutual insurance companies incorporated and liquidated in that state."

And that "Every person who was a member of a mutual insurance company at any time within the twelve months prior to the date of the commencement of * * * liquida-

"on proceedings * * * is liable to assessment in accordance with Section 346 of the New York Insurance Law."

The New York proceedings are summarized in the report of the Special Master (14 N. Y. Supp. (2) 501). This opinion is annexed to the brief (Exhibit "A").

All policies contain the standard clause entitling persons obtaining judgments against the insured to proceed against the insurance company under the terms of the policy to the same extent as the insured (R. 48A). The names of many defendants indicate their business as public carriers. By the statutes of Georgia and other States in which they did business as well as by the provisions of the Interstate Commerce Act the filing of their policies was a condition to the exercise of their certificates of public convenience. Against these policies the public has a direct right of action.

The mutual nature of the company appears from its name, from the profit sharing provisions in the face of the policy, and on the back of the policy is a specific recitation that "The Insured is hereby notified that by virtue of this Policy he is a member * * * entitled to vote * * * at any and all meetings of said company," and that "The contingent liability of the named Insured under this policy shall be limited to one year from the expiration or cancellation hereof and shall not exceed the limit provided by the Insurance Law of the State of New York."

Defendants moved generally to dismiss the bill because (a) it appeared that the policies had been delivered in Georgia, and (b) because the policies contained no provisions on their face for assessment nor reference to the by-laws. Although these defenses challenge presently their right to recover assessments and inferentially admitted the liability for premiums the Court sustained the demurrer and dismissed the entire bill (R. 80-81). The Supreme Court of Georgia affirmed with opinion (R. 82-96). Although the right to recover premiums was insisted upon

(R. 98) a rehearing was denied generally without opinion (R. 107).

The Supreme Court of Georgia construed petitioner's allegations that the defendants were policyholders and members as an averment that defendants were members because they were policyholders. Finding that the policies were delivered in Georgia, the Court ruled inapplicable the statutes of New York and the orders and decrees in the liquidation proceedings.

It concluded that the acceptance of the policy did not make a policyholder a member liable to assessment in accordance with the laws of the State of the company's domicile, although a reference to this liability appeared on the back of the policy "there being in the face of the policy no reference to any contingent liability or assessment, or to any law providing for such," and that this was true notwithstanding the charter of the company "provides that members shall be the policyholders, that its by-laws provide that every member shall be liable to assessment, and that the insurance law of the State of the Company's domicile contains a like provision."

It concluded that Georgia residents were not bound by the liquidation proceedings in New York because they had not been personally served but only by mail pursuant to the New York statutes. It deemed the service on the corporation insufficient, and held that the rulings of this Court, that the rights of members of a mutual corporation must be determined by the single law of the domicile of the corporation, were applicable only to fraternal orders having a lodge system and not applicable here, and that only Georgia law would be applied (R. 82).

It considered the contention advanced by petitioner that his rights to collect a fund for the payment of creditors, based upon assessments authorized by the statutes of New York and confirmed by the judgments of its courts, were

protected by the full faith and credit clause of the Federal Constitution (Article 4, Section 1), and denied it (R. 87-90).

Finally, it concluded that the rights of the defendants, under the Fourteenth Amendment of the Constitution of the United States, prevented enforcement of assessment rights based upon the statutes of New York and a charter granted thereunder (R. 89-90).

II.

Reasons Relied On for Allowance of the Writ.

The questions involved are of general public interest. They arise in the liquidation of an insolvent mutual casualty company, incorporated in New York under a statute and charter which require a contingent liability from all policyholders as a condition to their membership. Actions to recover these assessments have been brought in the States where these policyholders reside. The conflicting decisions permitting recovery in some States while denying recovery in other States under similar policies create an inequality of duty. Members of the public claiming subrogation under the terms of the policies or direct liability arising out of statutes affecting defendants who are public carriers, are also seriously affected by these conflicting views. The orderly collection of assessments and the payment of dividends cannot proceed until the conflict is settled.

1. The amount of premiums sued for indicate the ownership by certain policyholders of fleets of trucks or busses, the names of many defendants indicate their business as that of public carriers. These defendants have filed policies with the Public Service Commissions of the various States in which they do business and with the Motor Carrier Division of the Interstate Commerce Commission. The public has a direct right of action on these policies and a

vested interest in the capital arising from the statutory assessment. Exoneration of Georgia policyholders from liability destroyed this vested right of creditors.

2. The Supreme Court of Georgia held that in a suit brought by the statutory liquidator of an insolvent insurance company for the recovery of assessments against policyholders, recommended by the liquidator and approved by the domiciliary court, the laws of the forum afford the sole test of liability and the statutes, charter and decrees of the domicile must be disregarded. By its decision it nullified the provisions of the charter making assessments mandatory. It held in effect that this corporation could issue non-assessable policies to Georgia residents. The business of mutual insurance is conducted on the theory that its contracts are dependent upon the charter, as construed by the laws of the domiciliary State.

Supreme Council Royal Arcanum v. *Green*, 237 U. S. 531, 59 L. Ed. 1089.

Modern Woodmen v. *Mixer*, 267 U. S. 544, 69 L. Ed. 783.

Hartford Life Ins. Co. v. *Ibs*, 237 U. S. 662, 59 L. Ed. 1165.

Sovereign Camp Woodmen of the World v. *Bolin*, 305 U. S. 65, 83 L. Ed. 45.

McClement v. *Supreme Court I. O. F.*, 119 N. E. at page 101.

The intention to depart from the established rule was deliberate. The Supreme Court of Georgia relied on *McClement* v. *Supreme Court I. O. F.*, 152 N. Y. Supp. 136, a trial court decision which was reversed. *McClement* v. *Supreme Court I. O. F.*, 119 N. E. 99. It chose the law of the forum with knowledge that the principles relied on had, by this Court, been rejected in the cases of *Supreme Council Royal Arcanum* v. *Green*, *supra*, and *Sovereign Camp*

W. O. W. v. *Bolin, supra,* (R. 106). This rule destroys *pro tanto* the rights of all mutual insurance companies to enforce their charter provisions outside the State of their incorporation.

Decisions of this Court dealing with this principle have involved fraternal insurance associations and the Supreme Court of Georgia (R. 83), justified its departure on this ground. Whether these principles are equally applicable to casualty insurance companies is a question which has not been but should be decided by this Court.

3. The Supreme Court of Georgia (R. 90) assumed that the principles of statutory liability by corporate representation announced in *Hawkins* v. *Glenn,* 131 U. S. 319, 33 L. Ed. 184, had been modified if not reversed by *Great Western Telegraph Company* v. *Purdy,* 162 U. S. 337, 40 L. Ed. 986. Such a construction was not justified. This Court specifically limited its rulings to the local statute of limitations, properly applied.

4. While exempting residents of Georgia from liability to assessment when sued by the Liquidator of a company chartered in New York, the courts have heretofore afforded relief to their own residents, suing as creditors to recover assessments under similar conditions. (*Alma Gin & Milling Co.* v. *Peeples,* 145 Ga. 722, 89 S. E. 820). Such discrimination against a resident of New York denied to him the equality due all citizens, to which he was entitled under Article 4, Sec. 2, Paragraph 1 of the Constitution of the United States, and also deprived him of property without due process of law and the equal protection of the law, contrary to the provisions of the Fourteenth Amendment.

5. Absence of service on Georgia policyholders (R. 124) did not justify the exclusion of the statutes of New York and the decrees entered in the domiciliary proceedings.

(*In re Auto Mutual Indemnity Company*, 14 N. Y. Supp. (2) 601, Exhibit "A".) The presence of the corporation and service upon members by mail was sufficient. (*In re Auto Mutual Indemnity Company, supra*, at page 610.) The Supreme Court of Georgia in a full bench decision, binding as a precedent, has so held. *Howard* v. *Glenn*, 85 Ga. 238, 11 S. E. 610. The finding of jurisdiction was not subject to collateral attack in the courts of the forum.

6. The judgment under review is in direct conflict with the opinion of the Supreme Court of South Carolina in a case involving identical facts. (*Pink, Supt.* v. *T. B. Aaron, et al.*, Supreme Court of South Carolina, Case No. 2091, — S. E. —, decided March 3, 1941. Exhibit "B".)

The validity of the assessment has also been recognized by District Courts of Illinois and Kentucky. The question was certified for opinion to the Supreme Court of Maine by a trial court. A recovery of assessments was denied by the District Court of Georgia (*Pink, Supt.* v. *Georgia Stages, Inc.*, 35 Fed. Supp. 437), and a Circuit Court of Florida.

From a practical standpoint the conflicting decisions destroy the principle well established in this Court that "an assessment which was one thing in one State and another in another, and a fund which was distributed by one rule in one State and by a different rule somewhere else, would in practical effect amount to no assessment and no substantial sum to be distributed". *Royal Arcanum* v. *Green*, 237 U. S. 531 at 543, 59 L. Ed. 1089, L. R. A. 1916A, 771.

An authoritative decision from this Court, settling the conflict, is necessary.

The liability placed upon policyholders by statute is a substantive liability to which every policyholder subjected

himself when he accepted a policy from the company, irrespective of the terms of the policy.

Beha v. *Weinstock*, 160 N. E. (Court of Appeals of New York), at pages 17-18;

Compare *Peoples Banking Co.* v. *Sterling*, 300 U. S. 175 at 181.

The decision under review destroys the statutory liability. It also destroys the purpose of the parties to enter into a contract of mutual insurance that "everywhere it shall have the same meaning and give the same protection and that inequalities and confusion liable to result from applications of diverse State laws shall be avoided."

Bozeman v. *Connecticut General Life Ins. Co.*, 301 U. S. 196 at 206,

citing *Royal Arcanum* v. *Green*, *supra*.

III.

Federal Questions on Which Error is Assigned.

1. The statutes under which the Auto Mutual Indemnity Company was incorporated, its charter and by-laws, were not accorded the full faith and credit to which they were entitled under Article 4, Section 1 of the Constitution of the United States.

2. The judgment dismissing the petition and the opinion of the Supreme Court of Georgia denying all relief to a statutory liquidator of an insolvent mutual insurance company, chartered under the laws of New York, who sues to recover a balance of premiums admittedly due, and assessments levied in accordance with the statutes and charter provisions, is a violation of the rights guaranteed to him under the full faith and credit provision of the Constitution of the United States, Article 4, Section 1, and of the Fourteenth Amendment.

3. Refusal to accord recognition to the orders and decrees of the Supreme Court of New York, entered in the liquidation proceedings, entitled "*In re Auto Mutual Indemnity Company*, 14 N. Y. Supp. (2) 601", which adjudged the necessity for assessment and specifically adjudicated the liability to assessment of policyholders holding policies identical to those of the defendants residing in Georgia, is a denial of the full faith and credit due to the judgments of a sister State, guaranteed by Article 4, Section 1 of the Constitution of the United States aforesaid.

4. The orders and decrees of the domiciliary court approving the assessment, dated February 7, 1938 (R. 8), and the decree overruling exceptions by residents of South Carolina to the assessment on the ground that the policies contained no provision for assessment (being the identical policies involved here), were adjudications of the liability to assessment of policyholders of this class. (*In Re Auto Mutual Indemnity Company*, 14 N. Y. S. (2) 601 at 605, Appearance for Suburban Transit Company of Columbia, South Carolina. Also at page 607 general appearance for Suburban Transit Company, and at page 608 (8) contentions of residents of South Carolina and Ohio.)

The reference (14 N. Y. S. (2) at 605) was to hear and determine.

> "The decision of a referee appointed to hear and determine has the same effect as the decision of a justice of this (Supreme) Court."
>
> *Kiernan* v. *Consolidated Gas and Gasoline Engine Co.*, 201 N. Y. Supp. 78.

Wherefore, your petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of Georgia commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceed

ings of the said Supreme Court of Georgia had in the case numbered and entitled on its docket No. 13,549, Louis H. Pink, Superintendent of Insurance of the State of New York, Plaintiff-in-Error, vs. A. A. A. Highway Express, Inc., et al., Defendants-in-Error, to the end that this cause may be reviewed and determined by this Honorable Court as provided for by the statutes of the United States; and that the order and judgment of said Supreme Court of Georgia be reversed by this Court, and for such other and further relief as to this Court may seem proper; and your petitioner will ever pray.

Dated Atlanta, Georgia, March 25th, 1941.

LOUIS H. PINK,
Superintendent of Insurance
of the State of New York,
By MAX F. GOLDSTEIN,
ALFRED C. BENNETT,
ELLIOTT GOLDSTEIN,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

The opinion of the Supreme Court of Georgia is reported in 13 Southeastern Reporter (2nd), p. 337, and is appended to the record (R. 82-96, inclusive).

II.

Jurisdiction.

1. The date of the order and judgment of the Supreme Court of Georgia, affirming the dismissal of the case by the trial court, is January 16, 1941. The date of the judgment of the Supreme Court of Georgia denying a rehearing is February 14, 1941.

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925, Chapter 229, 43 Stat. 936.

3. The Supreme Court of Georgia passed upon the constitutional questions asserted in the trial court and denied them (R. 89-90).

III.

Statement of the Case.

This has already been stated in the preceding petition under "Summary Statement of Matter Involved" I (pp. 2 to 6).

IV.

Authorities and Argument.

A. Reasons Relied on for Allowance of the Writ.

1. The requirement that public carriers file insurance policies for the protection of the public is of recent origin.

Michigan Public Utilities v. *Duke*, 266 U. S. 570, 69 L. Ed. 207;

Hicklen v. *Coney*, 290 U. S. 169-177, 78 L. Ed. 247.

It probably had its origin in the requirement that taxicab operators provide some security for the public. These operators are men of small means and usually resort to mutual insurance.

Hadfield v. *Landin*, 168 Pac. 516, L. R. A. 1918(B) at 912.

In recent years the Interstate Commerce Commission has joined the States in requiring insurance.

University Overland Express v. *Alsop, et al., Public Utilities Commission*, 189 Atl. 458;

Blashfield's Automobile Laws, Vol. 1, page 131.

The validity of this requirement was recently sustained by this Court.

Merchants Mutual Ins. Co. v. *Smart*, 267 U. S. 129, 69 L. Ed. 542.

The names of many of the defendants disclose the nature of their business as public carriers and the amount of their premiums indicates their ownership of fleets of trucks or busses. What effect the decision in this case, relieving policyholders from liability, will have upon the liability of the company to the policyholders and the public is a doubtful question in which many persons have an interest.

The interim report of the liquidator discloses claims of the public arising out of policies filed with public officials aggregating in excess of one million dollars. A large portion of these claims are by residents of Georgia. An estoppel available against the policyholder will not bar the claims of the public if the policyholder has operated in intrastate or interstate commerce and has obtained his certificate by filing this policy against public liability.

> "Then there would be a clear case of estoppel in favor of the public represented by the commissioner which would prevent the company from denying the validity of its policy."
>
> *United States Casualty Co.* v. *Timmerman*, 180 Atl. 631;
>
> *McLaughlin* v. *Central Surety & Ins. Corp.*, 166 Atl. 621.
>
> *Bolta Rubber Co.* v. *Lowell Trucking Corp.*, 25 N. E. 2(2d) 973,

where the court, dealing with the recent requirement of the Interstate Commerce Commission, held:

> "The violation by truckers of requirement in policy * * * would not preclude shipper from enforcing for its own benefit the obligation of insurer to the extent of $1000 under indorsement added to policy pursuant to regulations of Interstate Commerce Commission. 45 U. S. C. A. Sec. 315."

And—

> *Floyd* v. *Consolidated Indemnity Ins. Co.*, 261 N. Y. S. 61, 237 App. Div. 190.

In Georgia, public carriers file policies with the Public Service Commission.

> *Great American Indemnity Co.* v. *Vickers*, 183 Ga. 233 at 234, 188 S. E. 24.

Members of the public have a direct interest "in maintaining sufficient insurance fund to pay losses. By section

109 of the Insurance Law the company was directly liable in case of insolvency of the insured to persons injured in an accident covered by the policy".

Beha v. *Weinstock*, *supra*, at page 18.

An unequal distribution of the burdens of assessment and dividends on claims results from the decision complained of. The court has not cited any local policy "whereby an insolvent foreign corporation in the hands of a liquidator with title must submit to the sacrifice of its assets or to their unequal distribution * * *."

Clark v. *Williard*, 292 U. S. 112 at 129, 78 L. Ed. 1160 at 1170.

In the absence of such a policy or controlling statute, the residents of Georgia should submit to assessment.

2. The Supreme Court of Georgia held (R. 93) "A contract of insurance is made, not where the policy was executed, but where it was in fact delivered. * * * as to where the contract was made the petition is silent."

The physical facts in the record are to the contrary. A typical policy exhibited shows execution by the principal officers in New York City with the corporate seal attached (R. 48A). The place where the contract was made is therefore certain. Its delivery in Georgia is a matter of conjecture, on which the record is silent.

The question raised upon demurrer for decision by the Georgia trial court was the legal effect of a contract of mutual casualty insurance, executed in New York, where the record is silent as to the place of delivery. The decision of the Georgia Supreme Court is not conclusive.

> "Whether the question be regarded as one of fact or more precisely and accurately as a question of law to be determined as are other questions of law, * * * it is one arising under the Constitution and a statute

of the United States which commands that such faith and credit shall be given by every court to the California proceedings 'as they have by law or usage' of that state. And since the existence of the federal right turns on the meaning and effect of the California (New York) statute, the decision of the Texas (Georgia) court on that point, whether of law or of fact, is reviewable here."

Adam v. *Saenger*, 303 U. S. 59 at 64, 82 L. Ed. 649 at 652.

"It does not matter that a member joined in another state."

Modern Woodmen v. *Mixer, supra*, 267 U. S. 544 at 551.

The place of the contract was the domicile of the company.

The Supreme Court of Georgia relied upon the principles announced in *McClement* v. *Supreme Court, I. O. F., supra*, 88 Misc. 475, 152 N. Y. S. 136 (R. 93). It overlooked the fact that the case was reversed by the Appellate Division and the reversal affirmed by the Court of Appeals of New York.

McClement v. *Supreme Court I. O. F., supra*, 119 N. E. 99.

The Supreme Court of Georgia also overlooked the fact that the liability of the company to the insured "is entirely separate from the liability of the policyholder to the other policyholders and creditors as an insurer." (Motion for rehearing, R. 99-100).

The Court declined to follow the principles in *Royal Arcanum* v. *Green, supra*, and subsequent cases citing the same principles, on the ground that they were rendered in cases involving fraternal orders with a ritualistic form of government (R. 83), and hence inapplicable to the case at bar. The error in so limiting the rule is obvious. It has been applied generally to stockholders and corporations of various

classes, and even to the rights of persons holding stock in a foreign corporation.

Nashua Savings Bank v. *Anglo-American Co.*, 189 U. S. 221 at 232, 47 L. Ed. 782 at 787.

The cases are collected in *In Re Auto Mutual Indemnity Company, supra*, at page 607-608 (Exhibit "A"). Many other cases could be added, including *Marin* v. *Augedahl*, 247 U. S. 142, 62 L. Ed. 1038, involving stockholders in a baking company.

The rule has been recognized in Georgia.

Howard v. *Glenn, supra*, 85 Ga. 238, 11 S. E. 610.

In *Swing* v. *Taylor & Crate* (W. Va.) 70 S. E. 373, the Court said:

> "By the law of Ohio in force when these policies were issued, a policyholder in a mutual company was made a member of such company, and was liable for losses and necessary expenses accruing to the company during the period of his insurance, 'in proportion to the original amount of his deposit note, or *contingent liability.*' The law of Ohio would, therefore, seem to make both classes of policyholders members of the company during the continuance of their policies. At any rate, the Court of Ohio has so construed the law of that state, and its construction must be accepted by this court. * * *."
>
> "The existence and extent of the liability of a shareholder for assessments or to contribute to the corporation for the payment of debts of the corporation is determined by the law of the state of incorporation. Restatement, Conflict of Laws, Sec. 203."
>
> *Broderick* v. *Stephano*, 314 Pa. 408, 171 Atl. 582.

Nor may the departure from the general rule above announced be justified on the theory that only the remedy is being passed on. In a recent case (*John Hancock Mutual Life Ins. Co.* v. *Yates*, 185 Ga. 213, 185 S. E. 268), the Georgia Supreme Court, in passing on a defense arising

from a New York contract, deemed the solution of the question one of remedy and excluded consideration of the *lex loci contractus*. This Court reversed the judgment (299 U. S. 178 at p. 182, 81 L. Ed. 106) holding:

> "No question of remedy is presented. The Company sets up as a defense a substantive right conferred by a statute of New York. * * * The declaration by the statute as construed and applied by the highest court of New York * * * determines the substantive rights of the parties as fully as if a provision to that effect had been embodied in writing in the policy."

The right asserted by petitioner is of the same class.

3. The Supreme Court of Georgia justified its denial of any force and effect to the decrees in the New York proceedings upon the authority of *Great Western Telegraph Company* v. *Purdy*, 162 U. S. 329, 40 L. Ed. 986, (R-92). The error in so doing has been previously discussed (Petition for Certiorari, paragraph 3), and will not be repeated.

4. The Supreme Court of Georgia held the assessment unenforceable in Georgia because the by-laws were not made a part of the policy directly or by reference (R. 94-96), and (R. 95-96) that the terms of the policy did not put the insured on notice that he was accepting a policy which was subject to assessment under the laws of New York, though knowledge is admitted that the Company was "mutual in character, and that the policyholders would be entitled to participate in the profits and surplus."

But the mutual nature of the Company was sufficient to put defendants on notice that they would be bound by the constitution and by-laws of the association. This is the law of Georgia (R. 101), and it is recognized by this Court as a matter of common knowledge.

> "The policyholders are the owners of the Company and constitute its membership."
>
> *Hartford Steam Boiler Co.* v. *Harrison*, 301 U. S. 459 at 464, 81 L. Ed. 1223 at 1227.

And it is the general law. *Huber* v. *Martin*, 115 Am. St. Rep. at page 1034 (R-102).

Indeed it has been the established law in Georgia for more than fifty years. *Carlton* v. *Southern Mutual Life Ins. Co.* (1884), 72 Ga. 371 at 372.

> "A mutual insurance company is based upon the idea that each of the assured becomes one of the insurers, thereby becoming interested in the profits and liable for the losses. * * * and in a mutual insurance company the idea of mutuality involves the result that each assured becomes interested in profits *and liable for losses.*" (Emphasis ours).
>
> *Carlton* v. *Southern Mutual, supra*, at page 372.

In *Alma Gin and Milling Company* v. *Peeples*, 145 Ga. 722, 89 S. E. 820, policyholders in a mutual fire insurance company resisted liability to assessment because the policies contained no reference to the constitution and by-laws. (Such requirement, imposed on fire insurance companies by statute, is not applicable to casualty companies). The Court, while recognizing the relevancy of this statute in an action to establish the liability of the company to the insured, deemed its absence not a defense in an action brought "to establish the liability of policyholders to pay assessments, and to compel them to contribute to the payment of losses sustained by another policyholder."

The discrimination against petitioner as a resident of New York is clear.

5. Decrees entered in the New York proceedings were binding upon policyholders resident in Georgia who received notice by mail. The New York Insurance Law, Chapter 28, Sec. 422 (4) provides that "The Superintendent shall cause a notice of such order (assessment) * * * to be enclosed in a sealed envelope, addressed and mailed, postage prepaid, to each of said members at his last known address as the same appears on the books of the insurer."

(R. 29). Such notice was mailed to all of the members, including the defendants in the Georgia proceedings. (Original petition, paragraph 10, R. 9). In cases where the corporation is already a party, such service is sufficient.

Nashua Savings Bank v. *Anglo-American Co.* 189 U. S. 221, at 230, 47 L. Ed. 782.

It does not appear that the statutory provisions for notice are insufficient to give actual notice of the proceedings and an opportunity to be heard. The defendants are members of a company domiciled in New York and the statutory service is sufficient.

Milliken, et al. v. *Meyer, et al.* October Term, 1940, Case No. 66, Advance Sheets United States Law Edition, Vol. 85, page 269 at 272-273.

6. A conflict in the decisions of the highest courts of Georgia and South Carolina having jurisdiction over the question, can be reconciled only by a decision of this Court and such conflict affords grounds for the grant of the writ.

B. The Title of the Liquidator.

The statutes of New York provide:

"The superintendent * * * shall be vested by operation of law with the title to all of the property, contracts and rights of action of such insurer as of the date of the order so directing them to liquidate * * *."

Insurance Laws of New York, Sec. 404(2).

In re *National Surety Company*, 7 Fed. Supp. 959.

"The statutes of New York relative to the liquidation of insolvent insurance companies * * * Insurance Laws, Sec. 400 to 428, inclusive, are intended to and do furnish a comprehensive, economical and efficient method for the winding up of the affairs of domestic insurance companies by the superintendent of insurance of New York for the benefit of all creditors.

> * * * Liquidation is effected by an order of the Supreme Court of the State of New York. Sections 403, 404. Upon the entry of such an order the superintendent * * * as liquidator, becomes the statutory successor of the corporation and is vested by operation of law with title to all of its assets, including choses in action. * * *. The superintendent of insurance became in effect a receiver under the supervision of the state court."
>
> *Motlow* v. *Southern Holding & Securities Corporation*, 95 Fed. (2) 721 at 724.

An assessment made by a statutory liquidator under the supervision of the domiciliary court is entitled to the same force and effect as a judgment.

> "If the assessment had been made in a liquidation proceeding conducted by a court, New Jersey would have been obliged to enforce it, although the stockholders sued had not been made parties to the proceedings, and, being nonresidents, could not have been personally served with process. Converse *v.* Hamilton, 224 U. S. 243, 252-260, 59 L. Ed. 749. * * *."
>
> *Broderick* v. *Rosner*, 294 U. S. 629 at 644, 79 L. Ed. 1100 at 1108.

C. Privileges Claimed Under the Constitution of the United States Were Considered and Denied (R. 89-90).

1. Mutual Automobile Liability Insurance Companies, chartered in New York, must issue assessable policies in every State in which they transact business.[1]

Factory Mutual Liability Ins. Co. v. *Behan, Acting Supt. of Insurance*, 253 N. Y. S. 562.

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[1] Mutual casualty companies require specific statutory authorization before they possess the corporate power to exempt their members from contingent liability to assessment. *Cooley's Briefs on Insurance*, Vol. 1, page 68.

> "* * * it is a distinguishing feature of a mutual company that one insuring therein becomes a member of the association. * * *
>
> "The members and stockholders of a mutual insurance company are therefore identically the same. * * * A stockholder of a mutual

The pleadings clearly allege the integration of the New York laws into the policies of the defendants (R. 22, 23, Paragraph 13(a) (b) (c) (d)).

Code of Georgia of 1933, *Section* 81-304, provides:

> "A demurrer denies the right to the relief sought, in whole or in part, admitting all properly pleaded allegations in the petition to be true."

The corporation "may correctly be said to be precisely what the incorporating act has made it, to derive all its powers from that act, and to be capable of exerting its faculties only in the manner which that act authorizes. To this source of its being, then, we must recur to ascertain its powers." *Head* v. *Providence Insurance Co.*, 2 Cranch 126, 167, quoted with approval in *Supreme Council Royal Arcanum* v. *Green*, 237 U. S. 531, *supra*, at 543.

The construction placed upon the statutes by the courts of New York must prevail.

Bradford Light Co. v. *Clapper*, 286 U. S. 145, 76 L. Ed. 1026, 82 A. L. R. 696.

2. The judgment approving the assessment was held applicable to policies held by non-residents, which contain on their face no provision for assessment.

In re Auto Mutual Indemnity Company, 14 N. Y. Supp. (2) at page 607.

The credit and effect given this judgment in the courts of New York determined the effect to which it was entitled in the courts of Georgia.

Hancock National Bank v. *Farnum*, 176 U. S. 640 at 644, 44 L. Ed. 619 at 621.

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insurance company is simply one who has paid into the capital of the company by way of premiums, and who is responsible for its losses to that extent."

A recent amendment of the New York Insurance Laws (Laws of 1939, Chapter 882, Sec. 58) will permit mutual casualty companies to issue non-assessable policies under certain conditions, but this power will not become effective until 1942.

3. What has been said above equally applies to this question.

4. In the report aforesaid, *In re Auto Mutual Indemnity Company, supra,* at page 609, the court decreed:

> "The failure of the policy to contain a clear statement as to the contingent mutual liability of the members has as little effect upon the liability to pay an assessment as would a provision in the policy contrary to the provision of Section 346. Thus if any provision in the by-laws or in the policy violates Section 346 it is void to that extent. Beha *v.* Gale, 129 Misc. 858, 223 N. Y. S. 253."

This adjudication was binding on the members resident in Georgia.

Modern Woodmen v. *Mixer, supra.*

The fact that the original right of action so decreed could not have been maintained in the courts of Georgia is not an answer.

Keeney v. *Supreme Lodge of World Loyal Order of Moose*, 252 U. S. 411 at 415, 64 L. Ed. 638 at 640.

D. Assent Was Not Necessary to Create Liability for Assessment.

The statutory liability that follows is imposed by law as an incident to membership in the corporation, regardless of assent to it and even in spite of agreement to the contrary.

Broderick v. *Rosner*, 294 U. S. 629, 79 L. Ed. 1100, *supra;*

Converse v. *Hamilton*, 224 U. S. 243, 59 L. Ed. 749;

Whitman v. *Oxford National Bank*, 176 U. S. 559, 44 L. Ed. 587;

Christopher v. *Norvell*, 201 U. S. 216, 50 L. Ed. 732;

Smathers v. *Bank*, 155 N. C. 283, 71 S. E. 345.

In the last two cases the estate of a married woman was held liable for assessment though the laws of the domicile made her contract void.

> "This liability is not contractual on the part of the stockholder, but is statutory and imposed for the benefit of creditors, and hence a married woman, when she becomes the owner of the stock, assumes the same liability as all other stockholders."
>
> *Smathers* v. *Bank, supra,* 71 S. E. at 346.

And in the *Christopher* case, *supra,*

> "The right to be a stockholder is given her by the law of the state where she resides and her *right and liability* as such are provided by the acts of Congress." (Italics by the court.)

The contingent liability is part of the capital of a mutual insurance corporation.

Warner v. *Delbridge* (Mich.), 34 L. R. A. 701 at 703.

> "The contingent fund * * * is a part of the fund upon the credit of which such contracts of insurance are entered into."
>
> "All the policyholders in the defendant (company) knew that they were taking insurance in a mutual company. Liability to assessment for loss is one of the incidents to insurance of that kind."

An agreement releasing this contingent liability would be void.

Upton v. *Tribilcock,* 91 U. S. 45, 23 L. Ed. 203.

Creditors have a vested right in this contingent liability.

Corning v. *McCullough,* 1 Comstock 47; 49 Am. Dec. 287 at 290.

A statute or decision which destroys this contingent liability violates the contract clause of the Constitution.

> "A clause in the charter of a corporation which pledges to the creditors of the company the liability of

the stockholders to the extent of their stock, is security to the creditors for the payment of the debts of the company which have been contracted upon the faith of this liability."

"In case of the inability or insolvency of the company, the stockholder, by such clause, becomes liable to the creditor for its debts, to the extent of his stock."

"A State Act repealing this individual liability clause of the charter is, as to debts contracted before the repeal, a law impairing the obligation of the contract within the Constitution of the United States, and void."

Hathorn v. *Josiah Calef*, 2 Wall. (69 U. S.) 10, 16 L. Ed. 776.

And it is an impairment of the contract right of all other members and creditors.

Coombes v. *Getz*, 285 U. S. 434 at 448, 76 L. Ed. at 866.

V.

Conclusion.

Divergent views of the courts of the several States, in which proceedings to recover assessments are pending, have resulted in "the application of many divergent, variable and conflicting criteria," the destructive effect of which was recognized by this Court in *Supreme Council Royal Arcanum* v. *Green*, *supra*, 237 U. S. at page 542.

Policyholders of this Company reside in twenty-seven States. The assessments levied against New York residents total $140,742.23 and assessments levied against policyholders residing outside the State of New York total $429,200.00.[2] Many of these assessments are for small amounts. To obtain jurisdiction over them in New York is impossible and the cost of the litigation would be prohibitive.

Compare *Broderick* v. *Rosner*, *supra*, 294 U. S. 639-640.

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[2] Sixth Report of Louis H. Pink, Liquidator, filed in the Supreme Court of New York County, Case No. 28894, in the matter of Liquidation of Auto Mutual Indemnity Company, January 19, 1940.

Unless the validity of the assessment in every State in the Union is established by a judgment of this Court requiring recognition of the New York statutes and proceedings, the physical difficulty and the cost of recovering the assessments will render the proceedings futile. All claimants, whether policyholders or members of the public, will be left without remedy.

Petitioner, as a public official, is charged with the duty of liquidating this particular company, and in the discharge of this duty he seeks to recover assessments from all policyholders. As Superintendent of Insurance of the State of New York, he is charged with the duty of examining and supervising the business of all insurance companies chartered by that State.

The mutual insurance companies have no capital other than the contingent liability provided by statute. In 1939 the premiums collected by mutual companies, chartered in New York, approximated fifty million dollars.[3] If the right of assessment conferred by the charter receives general recognition, then the contingent liability is twice this amount, a sum amply sufficient to provide reserves for any emergency. But if this assessment is not enforceable in some of the States in which the company did business, then this must be given consideration in determining the solvency of the company. If there is added to the loss of assessment the burden of claims arising in States where the assessment

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[3] From the 1940 New York Insurance Report the following facts appear: In 1939 casualty companies chartered in New York—Stock—had total admitted assets of $406,000,000.00 (approximate); Casualty companies—Mutual—total admitted assets of $107,000,000.00. During this year the Stock Companies received premiums approximating $171,803,000.00 and the Mutual Companies received premiums approximating $49,447,000.00. The capital guaranty funds of the Stock Companies totalled $46,000,000.00 (approximate) and the Mutual Companies had special deposits totalling $1,150,000.00. The balance of their capital fund is their right to assess their members sums not exceeding twice the annual premium.

is not collected,[4] a complicated and confused result follows.

The business of insurance cannot be properly conducted if "divergent, variable and conflicting criteria" arise in its operation in States other than the domicile.

The writ should be granted and the decision of the Supreme Court of Georgia should be reversed.

Respectfully submitted,

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[4] The Supreme Court of Georgia cites *Pink* v. *Georgia Stages, Inc.*, 35 Fed. Supp. 437 (R. 95) as a true statement of Georgia law. Though the right to collect assessments was denied, the claims of the policyholder against the fund in the hands of the Liquidator were allowed in the sum of $12,502.38. (Finding of Fact 10½, 35 Fed. Supp. 441). The vice in this decision is in the conclusion of law No. 10 (page 445) that the Company had corporate power to issue a non-assessable policy.

EXHIBIT "A".

IN RE AUTO MUT. INDEMNITY CO.

SUPREME COURT, NEW YORK COUNTY.

Sept. 8, 1939.

1. Appearance 17.

Nonresident policyholders of an insolvent mutual automobile casualty company, which was in process of liquidation, who filed special appearances objecting to jurisdiction of trial court to enter an order to show cause why superintendent of insurance should not have judgment against them for the amount of an assessment authorized to be levied against such policyholders, did not waive their objections to jurisdiction by simultaneously filing general objections to the merits or cross-claims. Insurance Law, §§ 340 et seq., 400 et seq., 422, subd. 4; § 423.

2. Appearance 9(1)

Where a policyholder objecting to an assessment directed to be levied against policyholders of an insolvent mutual automobile casualty company in process of liquidation filed objections on merits to order of trial court ordering policyholders to show cause why superintendent of insurance should not have judgment against them for amount of assessment, a general appearance resulted which was not vitiated by policyholder's subsequently attempted special appearance addressed to jurisdiction of trial court. Insurance Law, §§ 340 et seq., 400 et seq., 422, subd. 4; § 423.

3. Insurance 71(2)

The validity of an assessment made in connection with the liquidation of an insolvent insurance corporation, such as a mutual automobile casualty company, is governed by laws of state where corporation has its domicile. Insurance Law, §§ 340 et seq., 400 et seq., 422, subd. 4; § 423.

4. Corporations 31, 592

A corporation is created by edict of Legislature, and dies at its command.

5. Evidence 65

Knowledge is imputed to all who deal with a corporation that when it suspends business the law takes charge of its affairs, liquidates its debts, converts its assets and distributes the proceeds thereof among its creditors.

6. Evidence 65

Those who contract with a corporation do so with knowledge of the statutory conditions pertaining to the corporation, and such conditions must be deemed to have permeated the agreement and constituted elements of the obligations.

7. Corporations 391

A state may impose appropriate requirements for the privilege of doing business under its corporate laws.

8. Insurance 71(1)

Where assessment against policyholders of insolvent mutual automobile casualty company in process of liquidation was levied in accordance with laws of the state in which such corporation was domiciled, the assessment created a valid obligation in res and was binding alike on both resident and nonresident policyholders. Insurance Law, §§ 340 et seq., 400 et seq., 422, subd. 4; § 423.

9. Insurance 138(1)

If a provision in by-laws or policies of a mutual automobile casualty company violated the statute relating to assessments against members of such companies, the provision was void to extent that it violated the statute. Insurance Law, § 346.

10. Insurance 71(1), 193(1)

That policies issued by a mutual automobile casualty company and that the by-laws of the company may have been

silent with respect to assessments against policyholders in case of liquidation of company did not relieve policyholders from liability to pay an assessment directed to be levied in connection with liquidation of the company, but such failure merely prevented company from fixing a higher contingent liability than that specified by statute concerning contingent liability of members of such companies. Insurance Law, §§ 340 et seq., 346, 400 et seq., 422, subd. 4; § 423.

11. Insurance 71(3)

The statute providing that in absence of provision in policies and by-laws of a mutual automobile casualty company, the contingent liability of a member to pay assessments shall not be less than an amount equal to twice the amount of, in addition to, the cash premium provided for in the policy establishes a minimum contingent liability of members which must prevail in any event as to all companies coming within provisions of statute concerning incorporation of such companies. Insurance Law, §§ 340 et seq., 346.

12. Judgment 17(1)

Residents of New York can be bound by a judgment of New York courts without personal service of process, and as to such residents it is no objection to the validity of a proceeding that it does not require personal services of a notice or process upon the party whose property is in question.

13. Constitutional law 309(1)

Where notice of court order requiring policyholders of insolvent mutual automobile casualty company to show cause why superintendent of insurance should not have judgment against them for amount of an assessment was published by superintendent and a copy sent to each policyholder, in accordance with statute concerning levy of assessments against members of such companies, the notice was sufficient to satisfy constitutional requirements of due process with respect to right of superintendent to recover judgments thereon against resident policyholders. Insurance Law, §§ 340 et seq., 346, 400 et seq., 422, subd. 4; § 423.

14. Judgment 17(3)

In order to obtain a valid personal judgment against a nonresident, there must be personal service within the jurisdiction.

15. Constitutional law 309(1)

A judgment obtained without personal service within the jurisdiction, where a nonresident is affected, constitutes a "taking of property without due process of law."

16. Judgment 17(3)

Where nonresident policyholders of insolvent mutual automobile casualty company had not been served with process within the jurisdiction and had not appeared generally in filing objections to jurisdiction of trial court to order them to show cause why an assessment should not be paid, a personal judgment for payment of assessment would not be ordered against such policyholders although they were bound by the finding of necessity for the assessment and amount thereof. Insurance Law, §§ 340 et seq., 346, 400 et seq., 422, subd. 4; § 423.

17. Insurance 71(4)

That the notice of a court order requiring policyholders of an insolvent mutual automobile casualty company, which was in process of liquidation, to show cause why they should not be held liable to pay an assessment levied against them, failed to designate parties plaintiff or defendant, or to show, on its face, to whom the notice was addressed, did not render the notice insufficient to comply with statute concerning duty of superintendent of insurance to publish such notices, since proceeding for judgment upon the assessment was a "special proceeding," and not an "action at law." Insurance Law, §§ 340 et seq., 346, 422, subd. 4; § 423.

[Ed. Note.—For other definitions of "Action; Action at Law" and "Special Proceeding," see Words & Phrases.]

18. Insurance 71(2, 3)

Objections filed by policyholders of an insolvent mutual automobile casualty company complaining as to amount and time of levying an assessment against them and as to court order directing them to show cause why superintendent of insurance should not have judgment against them for the assessment were without merit where amount of assessment was within limits of contingent liability of such policyholders under policies and statute and method of computing assessment conformed to statutory requirements and superintendent's report as to assets of company was filed within one year as required by statute and conformed thereto. Insurance Law, §§ 340 et seq., 346, 400 et seq., 422, subd. 4; § 423.

19. Insurance 71(1, 2)

That policyholders of an insolvent mutual automobile casualty company were not notified of an assessment imposed upon them within one year after the expiration or cancellation of their policies, as provided by statute, and that they were not members of the company at the time liquidation proceedings were instituted against it, did not relieve the policyholders from liability for assessment. Insurance Law, §§ 340 et seq., 346, 400 et seq., 422, subd. 4; § 423.

20. Insurance 71(2)

The statutory provision for notice to members of mutual automobile casualty companies with respect to assessments is not applicable to an assessment levied in liquidation proceedings involving such companies, but relates only to assessments made by the company as a going concern. Insurance Law, § 346.

21. Insurance 71(1)

The date when liability of policyholders of a mutual automobile casualty company to pay assessments for protection of creditors accrued was the date upon which a liquidation proceeding involving such company was commenced, and

members whose policies had expired or had been canceled within one year prior to date of commencement of liquidation proceedings were to be treated as included among persons liable to assessments. Insurance Law, §§ 340 et seq., 346, 400 et seq., 422, subd. 4; § 423.

22. Insurance 63

Policyholders of an insolvent mutual automobile casualty company could not offset their personal claims against the company against an assessment imposed in liquidation proceedings involving the company. Insurance Law, §§ 340 et seq., 346, 400 et seq., 420, subd. 2; 422, subd. 4; § 423.

23. Insurance 63

The principle of actual set-off, often applied under bankruptcy or other insolvency laws, has no application where the obligation is to pay an assessment.

24. Insurance 71(1)

That a mutual automobile casualty company breached its contract with its policyholders when it was placed in liquidation did not relieve such policyholders from liability for assessments, although breach by company gave rise to a provable claim against fund of the company in hands of superintendent of insurance. Insurance Law, §§ 340 et seq., 346, 400 et seq., 422, 423.

Proceeding in the matter of the liquidation of the Auto Mutual Indemnity Company, wherein there was an application for an order directing judgments upon assessment, and upon other indebtedness, pursuant to the Insurance Law, §§ 422, 423, and the case was referred to a referee to hear and determine the issues raised by objections to the assessment directed by the court to be levied against policyholders of the company.

Order recommended in accordance with opinion.

Irvin Waldman, of New York City, for Louis H. Pink, Superintendent of Insurance.

Mullen & Feller, of New York City (Samuel R. Feller and Leo H. Hirsch, Jr., both of New York City, of counsel), for West Penn Forwarding Co., Inc.

Simpson, Thacher & Bartlett, of New York City (Frederick B. Lee, of New York City, of counsel), for Dixie Coaches, Inc.

Kaufman & Weitzner, of New York City (H. W. Fensterstock and Max Herschaft, both of New York City, of counsel), for Roadway Transit Co.

Benjamin M. Goldstein, of Monticello, for Allen Bros. Inc., et al.

Frank A. Pfalzer, of Buffalo (Vito Cardo, of New York City, of counsel), for New York Car Carriers, Inc.

Michael A. Petroccia, of Glen Cove, L. I., for All States Freight, Inc.

Brown & Gutze, of Columbia, S. C., for Suburban Transit Co. of Columbia, S. C.

Benjamin Gollay, of New York City, for Elmhurst Taxi Corporation.

William C. Hare, of New York City, for B. H. Griggs.

Max Herschaft, of New York City, for Rupp Drug Co. Inc., et al.

Max Herschaft, of New York City, for Mack Beverage Co. et al.

Bose & MacCarthy, of New York City (John C. MacCarthy, of New York City, of counsel), for Clayton H. Exner and Robert H. Carr.

William G. Sheppard, in pro. per.

FRANKENTHALER, Referee:

This is a reference to hear and determine the issues raised by objections to an assessment directed by the Court to be levied against the policyholders of an insolvent mutual automobile casualty insurance company in process of liquidation. The levy was made pursuant to the pertinent provisions of the Insurance Law by reason of the insufficiency of assets to pay liabilities. Objections to the levy challenge the validity of the statute authorizing the levy, the applicability thereof to non-residents, the propriety of the procedure followed by the Superintendent and the amount of

the assessment. Rights of set-off for unearned premiums and accrued loss claims are advanced by members and the propriety thereof is contested.

Auto Mutual Indemnity Company, now in liquidation, was incorporated on May 26, 1932, under Article 10-B of the Insurance Law, as a mutual automobile casualty insurance company. It was authorized by the Insurance Department on October 5, 1932, to transact business in the State of New York and thereafter secured authority to do business in a large number of other states. On February 21, 1933, its original name "Auto Cab Mutual Indemnity Company" was changed to "Auto Mutual Indemnity Company."

On November 10, 1937, the Superintendent of Insurance instituted proceedings against the company pursuant to Article XI of the Insurance Law, and the company was placed in liquidation on the ground of insolvency on November 24, 1937, by an order of this Court. The superintendent then proceeded, within one year thereafter, as provided by the Insurance Law, § 422, to make a report setting forth the reasonable value of the assets, the probable liabilities and the probable necessary assessment to pay all allowed claims in full.

Accordingly, on February 7, 1938, the Court by order authorized a levy of 40%. This assessment applied to all members of the company against whom the Board of Directors could levy an assessment at the time when the special proceeding against the company was instituted.

The Superintendent of Insurance computed the amount against each person liable therefor, together with a statement of the liability of the policyholder for other indebtedness in accordance with Section 423 of the Insurance Law, and made a second and supplementary report thereon.

On the basis of this second report an order to show cause was issued on August 12, 1938, directing payment on or before September 19, 1938, of the assessments and other liabilities of the members to the company, and ordering the members whose assessments and other liabilities remained unpaid on that date to show cause why they should not be held liable to pay the same and why the Superintendent should not have judgment accordingly. Notice of such order, with the summary of its contents as required by the

Insurance Law, Section 422, subdivision 4, was published and mailed to each of the members in accordance with the said order. Objections having been filed by various policyholders, hearings were had upon said objections.

Certain preliminary contentions urged by the Superintendent of Insurance are to be considered. Special notices of appearance were filed on behalf of certain policyholders objecting to the jurisdiction of the Court, accompanied by general objections going to the merits of the claim or setting up cross-claims.

[1] It is urged by the Superintendent that an objection based upon the merits accompanying a special appearance challenging the jurisdiction nullifies such special appearance on the theory that service of an answer addressed to the merits of a complaint is inconsistent with a special appearance interposed to contest the jurisdiction. Section 422 of the Insurance Law provides for a method of interposing an answer to the order to show cause, by means of appearance and service of verified objections. A non-resident policyholder objecting to the jurisdiction might rest his entire case upon that ground, yet he should not be deprived of such objection by having simultaneously filed general objections in order to save his substantive rights in the event his main challenge should be overruled. Accordingly, those non-residents who have filed objections to the jurisdiction and simultaneously also filed general objections to the merits or cross-claims, will not be deemed to have waived their objection to the jurisdiction. If the objection to the jurisdiction is sustained in their cases, it will be unnecessary to consider the objections on the merits, which will then be deemed withdrawn.

[2] On the other hand, the rule should not be extended beyond reasonable limits. One of the objectants, Suburban Transit Company, filed objections on the merits, and thereafter sought to supplement them by a special objection addressed to the jurisdiction. Its motion to allow a notation of special appearance based on lack or jurisdiction having been denied, reconsideration is now requested. The original determination will be adhered to. An objection addressed

solely to the merits having been filed, a general appearance results which should not be vitiated by a subsequent special appearance.

[3-6] Constitutional questions have been raised with reference to the validity of the assessment and the propriety of the notice to members. These questions have been presented by resident and non-resident members alike. It is well settled that the validity of an assessment made in connection with the liquidation of an insolvent insurance company is governed by the laws of the state where the corporation has its domicile. Modern Woodmen of America *v.* Mixer, 267 U. S. 544, 551, 45 S. Ct. 389, 69 L. Ed. 783, 41 A. L. R. 1384; Supreme Council of Royal Arcanum *v.* Green, 237 U. S. 531, 542, 35 S. Ct. 724, 59 L. Ed. 1089, L. R. A. 1916A, 771; People *v.* American Loan & Trust Co., 172 N. Y. 371, 65 N. E. 200; Broderick *v.* Rosner, 294 U. S. 629, 55 S. Ct. 589, 79 L. Ed. 1100, 100 A. L. R. 1133. As was said in People *v.* American Loan & Trust Co., supra, 172 N. Y. at page 377, 65 N. E. at page 201, "A corporation is created by the edict of the legislature, and dies at its command. Knowledge is imputed to all who deal with it that when it suspends business the law takes charge of its affairs, liquidates its debts, converts its assets, and distributes the proceeds among its creditors. Those who contract with it do so 'with knowledge of the statutory conditions, and these must be deemed to have permeated the agreement and constituted elements of the obligation.' People *v.* Globe Mut. Life Ins. Co., 91 N. Y. 174, 179; People *v.* Security Life Ins. & Annuity Co., 78 N. Y. [114] 115, 34 Am. Rep. 522."

[7] This rule follows the principle that a state may impose appropriate requirements for the privilege of doing business under its laws. In Modern Woodmen of America *v.* Mixer, 267 U. S. 544, 551, 45 S. Ct. 389, 69 L. Ed. 783, 41 A. L. R. 1384, the Court said: "The act of becoming a member is something more than a contract, it is entering into a complex and abiding relation, and as marriage looks to domicil, membership looks to and must be governed by the law of the State granting the incorporation."

The rule and the reason therefor are fully stated in Supreme Council Royal Arcanum *v.* Green, 237 U. S. 531, 35

S. Ct. 724, 728, 59 L. Ed. 1089, L. R. A. 1916A, 771, where Mr. Chief Justice White said: "* * * an assessment which was one thing in one state and another in another, and a fund which was distributed by one rule in one state and by a different rule somewhere else, would in practical effect amount to no assessment and no substantial sum to be distributed. It was doubtless not only a recognition of the inherent unsoundness of the proposition here relied upon, but the manifest impossibility of its enforcement which has led courts of last resort of so many states in passing on questions involving the general authority of fraternal associations and their duties as to subjects of a general character concerning all their members to recognize the charter of the corporation and the laws of the state under which it was granted as the test and measure to be applied. * * * In addition it was by the application of the same principle that a line of decisions in this court came to establish: first, that the law of the state by which a corporation is created governs in enforcing the liability of a stockholder as a member of such corporation to pay the stock subscription which he agreed to make; second, that the state law and proceedings are binding as to the ascertaining of the fact of insolvency and of the amount due the creditors entitled to be paid from the subscription when collected; and third, that putting out of view the right of the person against whom a liability for a stockholder's subscription is asserted to show that he is not a stockholder, or is not the holder of as many shares as is alleged, or has a claim against the corporation which at law or equity he is entitled to set off against the corporation, or has any other defense personal to himself, a decree against the corporation in a suit brought against it under the state law for the purpose of ascertaining its insolvency, compelling its liquidation, collecting sums due by stockholders for subscriptions to stock and paying the debts of the corporation, in so far as it determines these general matters, binds the stockholder, although he be not a party in a personal sense, because by virtue of his subscription to stock there was conferred on the corporation the authority to stand in judgment for the subscriber as to such general questions. Selig *v.* Hamilton, 234 U. S. 652,

34 S. Ct. 926, 58 L. Ed. 1518 [Ann. Cas. 1917A, 104]; Converse *v.* Hamilton, 224 U. S. 243, 32 S. Ct. 415, 56 L. Ed. 749 [Ann. Cas. 1913D, 1292]; Bernheimer *v.* Converse, 206 U. S. 516, 27 S. Ct. 755, 51 L. Ed. 1163; Whitman *v.* National Bank, 176 U. S. 559, 20 S. Ct. 477, 44 L. Ed. 587; Hawkins *v.* Glenn, 131 U. S. 319, 9 S. Ct. 739, 33 L. Ed. 184."

[8] The assessment was duly levied in accordance with the statutes of the State of New York where the corporation had its domicile and it follows that the validity of the assessment as an obligation in res is binding alike upon non-residents and residents. Even if the law were otherwise, the contentions of those residents of South Carolina and Ohio who proved the statutory law of their respective states cannot be sustained because an examination of those statutes shows that the provisions thereof do not bar the enforcement of the provisions of the New York statute. Whether that liability can be converted into a personal judgment against a non-resident policyholder without actual personal service upon him as distinguished from constructive service is a different question.

It is urged by some members that the statute relating to assessment covers only such policies as expressly provided for assessments. The company had issued various forms of policies, some of which bore a reference to the contingent liability prescribed by Section 346 of the Insurance Law, in the body of the policy and others of which referred to it on the reverse side thereof. All of the policies, however, referred to this contingent liability. Where such policies were silent on the subject of assessments or had no clear statement thereon, the obligation for an assessment is claimed by the objectants not to exist. This argument is predicated on the assumption that Article 10-B of the Insurance Law, dealing with mutual automobile casualty insurance corporations, did not contemplate mandatory assessments in such cases.

[9-11] Section 346 provides that the "corporation shall in its by-laws and policies fix the contingent mutual liability of the members * * *; but such contingent liability of a member shall not be less than an amount equal to twice the amount of, and in addition to, the cash premium pro-

vided for in the policy * * *." Objectants contend that unless the assessment plan is mentioned in the by-laws there is no liability to pay it. The argument is not sound. The statute compels the corporation to fix the contingent mutual liability. Even if it has failed to comply with this mandatory provision it could not be said that no assessment is due. Were it held otherwise the statute would be nullified. The failure of the policy to contain a clear statement as to the contingent mutual liability of the members has as little effect upon the liability to pay an assessment as would a provision in the policy contrary to the provision of Section 346. Thus if any provision in the by-laws or in the policy violates Section 346 it is void to that extent. Beha v. Gale, 129 Misc. 858, 223 N. Y. S. 253. The statute fixes the contingent liability at not less than the amount therein provided. Failure to fix any other amount in the by-laws and policy merely prevents the company from fixing a higher contingent liability. In that event the minimum specified in the statute becomes also the maximum. The correctness of this position is confirmed by the last sentence of Section 346 which provides that "All assessments * * * shall be for no greater amount than that specified in the policy and by-laws". In the absence of such provision in the policy and by-laws, the provisions of the first sentence of Section 346 that "such contingent liability of a member shall not be less than an amount equal to twice the amount of, and in addition to, the cash premium provided for in the policy" becomes applicable. That minimum must prevail in any event as to all companies coming within the provisions of Article 10-B. Moreover, the statute provides that "every member shall be liable to pay and shall pay his proportionate part of any assessment which may be laid by the corporation in accordance with law and his contract, covering any deficiency * * *."

Though the provisions of that particular section are clear, a study of Article 10-B confirms the interpretation above set forth. This construction is reasonable, within the intent of the statute, and accomplishes the purpose intended to protect policyholders, creditors and the general public.

The right of the Superintendent to recover judgments against policyholders by proceeding in accordance with the

provisions of Section 422 of the Insurance Law is challenged as a violation of the requirement of due process of law.

[12] Residents of this state can be bound by the judgment of its courts without personal service of process. Continental National Bank v. Thurber, 74 Hun 632, 634, 26 N. Y. S. 956, affirmed, Continental Nat. Bank of Boston v. United States Book Co., 143 N. Y. 648, 37 N. E. 828; United States Trust Co. v. United States Fire Ins. Co., 18 N. Y. 199, 215; Broderick v. Rosner, 294 U. S. 629, 646, 55 S. Ct. 589, 79 L. Ed. 1100, 100 A. L. R. 1133; Clement v. May, 136 App. Div. 199, 120 N. Y. S. 588, 591. As was said in the case last cited: "It is no objection to the validity of the proceeding that it does not require personal services of a notice or process upon the party whose property is in question. It is sufficient if a kind of notice is provided by which it is reasonably probable that the party proceeded against will be apprised of what is going on or against him and an opportunity is afforded him to defend. Matter of Empire City Bank, 18 N. Y. 199; Rockwell v. Nearing, 35 N. Y. 302; Happy v. Mosher, 48 N. Y. [313], 317; Hiller v. B. & M. R. R. Co., 70 N. Y. 223; Matter of Union E. R. R. Co. of Brooklyn, 112 N. Y. 61, 19 N. E. 664, 2 L. R. A. 359. The Legislature has uniformly acted upon that understanding of the Constitution, and has provided for the services of process or notice upon natural persons by posting, publication, by mail, by leaving the notice at the parties' place of residence, or by leaving it with the person in whose possession the property may be found."

[13] Section 422 of the Insurance Law requires the Superintendent to cause the notice to policyholders to be published and a copy to be enclosed in a sealed envelope, addressed and mailed, postage prepaid, to each member at his last known address. Such notice was published and sent by the Superintendent to each member. It was reasonably calculated to inform the parties of the proceedings and they were afforded an opportunity to be heard in defense before an impartial tribunal. Under those circumstances the notice satisfies the requirements of due process in so far as residents of this state are concerned.

[14, 15] The rule is otherwise as to non-residents. It is well settled that in order to obtain a valid personal judgment against a non-resident there must be personal service within the jurisdiction. Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565; Pope v. Heckscher, 266 N. Y. 114, 194 N. E. 53, 97 A. L. R. 687. A judgment obtained without personal service within the jurisdiction, where a non-resident is affected, constitutes a taking of property without due process of law. Riverside & Dan River Cotton Mills, Incorporated, v. Menefee, 237 U. S. 189, 35 S. Ct. 579, 59 L. Ed. 910; Matter of McDonald, 225 App. Div. 403, 406, 233 N. Y. S. 368; McCarthy v. Culkin, 254 N. Y. 328, 331, 172 N. E. 524.

In Pope v. Heckscher, supra, a judgment was recovered in a Canadian Court against a resident of this State for the unpaid balance of a subscription to stock of a Canadian corporation after service of process by mail directed to the defendant at his address in this State. The Court held that had the judgment been one of another State it would not have been entitled to full force and effect and that no greater weight was to be given to a judgment of a foreign country. Accordingly, the action based on the Canadian judgment was dismissed. The Court at page 119 of 266 N. Y., 194 N. E. at page 54, 97 A. L. R. 687, quoted as follows from Hess v. Pawloski, 274 U. S. 352, 47 S. Ct. 632, 71 L. Ed. 1091: " 'Notice sent outside the State to a nonresident is unavailing to give jurisdiction in an action against him personally for money recovery. Pennoyer v. Neff, 95 U. S. 714 (24 L. Ed. 565). There must be actual service within the State of notice upon him or upon some one authorized to accept service for him.' "

In Hood v. Guaranty Trust Company, 270 N. Y. 17, 200 N. E. 55, 59, involving an assessment against the stockholders of a North Carolina Bank, the Court of Appeals upheld a judgment for the North Carolina Commissioner of Banks, but made the statement that "Nothing in this opinion is to be construed as holding that without personal service within the state personal judgment could be entered against a nonresident stockholder. * * * We merely hold that the stockholders, having implicitly agreed that the corporation represent them, are bound by a finding of the

necessity for an assessment and the amount of the assessment."

[16] These rules of law are equally applicable in the case of policyholders in a mutual insurance company. Accordingly no personal judgment will be ordered against nonresident members or policyholders who have not appeared generally or been served personally with process within the State, although, as hereinabove set forth, they are bound by the finding of the necessity for the assessment and the amount thereof.

[17] Certain alleged defects of form of the notice are asserted, for example, that no parties plaintiff or defendant are designated and that the notice does not show on its face to whom it appears to be addressed. These and other similar objections are without substance. This being a special proceeding and not an action at law, it is unnecessary to have in the notice the name of a plaintiff and of a defendant. Furthermore, the notices clearly set forth the names of the persons to whom they are addressed. The notices complied with the statute and were reasonably calculated to apprise the persons to whom they were addressed of the pendency of the proceeding and they were afforded an opportunity to defend. Sufficient notice was therefore given.

[18] The objections relating to the amount of the assessment and to the time of levying the same as well as the validity of the orders made February 7, 1938, and August 12, 1938, are also wholly without merit.

The amount of the assessment is well within the limit of contingent liability under the policy and the statute, and the method of computing the same conformed to the statutory requirements. The report, filed within the year as required by Section 422, showed the reasonable value of the assets, the probable liabilities, the probable necessary assessments, and an equitable levy in accordance with Sections 346 and 422 of the Insurance Law. The experience of the liquidator since the submission of his original report upon the assessment indicated an underassessment rather than over-assessment.

[19-21] Nor can the objection of some of the policyholders that they were not notified of the assessment within one year after the expiration or cancellation of their policy, as provided by Section 346, and that they are not subject to assessment because they were not members of the corporation at the time this proceeding against it was instituted, be upheld. The provision for notice is not applicable to an assessment levied in a liquidation proceeding and relates only to assessment made by the corporation as a going concern. Beha v. Weinstock, 247 N. Y. 221, 160 N. E. 17. The present liquidation proceeding was commenced on November 10, 1937. This was a date when the liability of the policyholders to assessments for the protection of creditors accrued. It was, therefore, proper for the Superintendent to regard it as the date of constructive notice of such liability,—the company having been closed on account of insolvency. Members whose policies had expired or been cancelled within one year prior to November 10, 1937, were, therefore, to be treated as included among these persons liable to assessments. That treatment by the Superintendent is in accordance with law.

Several policyholders have attempted to extinguish the assessment in whole or in part by off-sets for unearned portions of premiums paid by them and by other claims against the company.

Subdivision 2 of Section 420 of the Insurance Law provides that "No set-off shall be allowed in favor of any such person [meaning a person other than insurer], however, where * * * (c) the obligation of such person is to pay an assessment levied against the members of a mutual insurer or to pay a balance upon a subscription to the capital stock of a stock corporation insurer."

[22, 23] The statute is precise on this point and even in the absence of the statute there could be no such set off. Lawrence v. Nelson, 21 N. Y. 158; Raegener v. Hubbard, 167 N. Y. 301, 60 N. E. 633; Commonwealth v. Mass. Mutual Fire Ins. Co., 112 Mass. 116, 124; Standard Printing and Publishing Co. v. Bothwell, 143 Md. 303, 122 A. 195, 31 A. L. R. 1269. The principle of actual set-off often applied under the bankruptcy or other insolvency laws has no appli-

cation where the obligation is to pay an assessment. The early decision in this state on the point was Lawrence v. Nelson, 21 N. Y. 158, where the Court at page 163, referring to a situation of insolvency, said: "When such a state of things exists in a company of mutual insurers, whose members have each an equal interest in its means, and are each creditors as well as debtors, to allow one member or creditor to get more than his share of the common fund by setting off his individual claim in full, and thereby decreasing the shares of his associate creditors, would be unjust and inequitable. * * * The referee therefore correctly decided that the defendants could not set off in full their loss on the 'Galena', but that they were bound to pay their premium notes, and come in, as they proposed to do in regard to their other claims, in a pro rata division of the assets of the company amongst all its members and creditors. What, as mutual insurers, they were ratably entitled to, could only be ascertained after all the means of this association were called in, and the demands upon it liquidated." The claims on account of losses under policies, or for damage for breach of the terms of the policies, or on account of unearned premiums, cannot be asserted as setoffs against the assessment.

[24] Objection by certain policyholders to the assessment on the ground that the order of liquidation caused a breach of the policy contract which relieved them from the payment of the assessment, is without merit. A casualty insurance company which is placed in liquidation simultaneously breaches its policy contracts because the law prevents it from defending actions and performing other terms of the policy. Though this breach by the company gives rise to a provable claim against the fund in the hands of the Superintendent of Insurance (In re Empire State Surety Company, 214 N. Y. 553, 570, 108 N. E. 825) it does not relieve the policyholder from liability for assessment under Sections 422 and 423 of the Insurance Law. To hold otherwise would be tantamount to ruling that the institution of liquidation proceedings on the ground of insolvency, which is the very foundation for the levy of the assessment, at the same time causes a breach of contract which affords

a complete defense to the collection of the assessment. This would destroy the purpose of the statute. The breach of contract is no defense to the assessment though damage resulting from the breach may be provable against the fund.

The Superintendent will submit an order disposing of the issues raised by the objections, in accordance with this opinion.

EXHIBIT "B".

THE STATE OF SOUTH CAROLINA IN THE SUPREME COURT.

Louis H. Pink, Superintendent of Insurance of the State of New York, *Appellant-Respondent*,

v.

T. B. Aaron, *et al.*, *Respondents-Appellants*

Appeal from Richland County, E. H. Henderson, Judge.

Case No. 2091.

Opinion No. 15223—Filed March 3, 1941

Affirmed

Thomas, Cain & Black, of Columbia, for appellant-respondent.

Colin S. Monteith, Jr., Edwin H. Cooper, and Frank A. Graham, Jr., all of Columbia, for respondents-appellants, and R. McC. Figg, Jr., of Charleston, for certain respondents.

Bonham, *C. J.*:

The Auto Mutual Indemnity Company is incorporated under the laws of the State of New York; it has policy holders in this and States other than New York. It became financially involved. The Supreme Court of New York, by its order, placed the Company in rehabilitation. Upon a proper showing by the liquidator that an assessment against all members (policy holders) of the Company was necessary to meet the liabilities of the Company, an order of the Court was made directing that such assessment be made. Thereupon, the liquidator computed the amount due by each policy holder, including the defendants in this action, and the Court ordered the members to pay to the liquidator the amount assessed against them.

The present action was brought in the Court of Common Pleas for Richland County against the defendants, as resi-

dents of the State of South Carolina, and certain of them (named) as residents of Richland County, to collect the assessment levied against each of them as set forth in Exhibit A attached to the complaint.

The complaint alleges that the action is in the nature of a Creditor's Bill instituted for the purpose of marshaling the assets of the said Auto Mutual Indemnity Company.

Certain of the defendants demurred to the complaint on the first, fifth and sixth grounds thereof namely:

"(1) That this Court has no jurisdiction of the subject of the action for the reason that the complaint fails to allege and shows on its face that a petition or complaint by the plaintiff creditor, on behalf of himself and all other such creditors, was ever filed in a Court in the State in which the Auto Mutual Indemnity Company was domiciled, asking that said company be declared insolvent and for the appointment of a liquidator to wind up its business and affairs, or that said company was ever a party defendant in any action brought for the purpose of determining its insolvency and establishing the amount of the assessment liability of its members, or that a final adjudication thereof had been rendered and judgment entered thereon, or that any order of Court was ever signed and filed authorizing the plaintiff to maintain any such action as this in the State of South Carolina; that the New York Court did not acquire jurisdiction over the defendant and, therefore, had no power to render any such judgment against this defendant; and that the plaintiff further fails to allege any New York statutes authorizing such a judgment."

"(5) That several causes of action have been improperly united in that the complaint alleges that the party defendants hereto are liable for an assessment and in addition thereto are liable for other indebtedness, and further that each separate action against each defendant arises out of different facts and under separate contracts and to which there are separate defenses.

"(6) That the complaint does not state facts sufficient to constitute a cause of action for the reason that the said complaint fails to show on its face the existence of any

contract of insurance entered into by and between the said Auto Mutual Indemnity Company and the party defendants hereto or that a contract of insurance issued by said Auto Mutual Indemnity Company provides for the levying of an assessment against its members and furthermore said complaint has failed to allege the provisions of Section 8100, 1932 Code of Laws of South Carolina, which provides that a mutual company not possessed of assets at least equal to the unearned premium reserve, and other liabilities shall make an assessment to provide for such deficiency upon only such members as are liable in proportion to their several liabilities as expressed in their policies and that each such member shall be liable only on account of losses and expenses incurred while his policy was in force."

Certain other defendants demurred as follows:

"3. That it appears on the face of the complaint that the action is alleged to be a creditor's bill, brought by the plaintiff as representing and in the right of the debtor, to wit, the defunct insurance corporation, and the plaintiff is not a creditor of said corporation, and no cause of action in the nature of a creditor's bill lies either in plaintiff's favor or in favor of the defunct corporation against the alleged debtors of the defunct insurance corporation."

"2. That it appears on the face of the complaint that there is a misjoinder of the causes of action, in that the causes of action against the several defendants are separate and distinct, and not joint, and under the law cannot be joined in the same complaint."

The demurrers were heard by His Honor, Judge Henderson, who filed the following order.

"This case comes before me on demurrers interposed by several of the defendants.

"The grounds of the demurrers are that the Court has no jurisdiction of the person of the defendant or the subject of the action; that the plaintiff has not legal capacity to sue; that there is a defect of parties plaintiff and defendant; that the complaint does not state facts sufficient to

constitute a cause of action; and that several causes of action have been improperly united.

"I have given careful consideration to the oral arguments, and the very helpful written briefs which were filed with me, and I am of opinion that all of the grounds of the demurrers, except the last one, should be overruled. I think, though, that the demurrers should be sustained on the ground that several causes of action have been improperly united.

"The complaint alleges that Auto Mutual Indemnity Company was a mutual insurance company, under the laws of the State of New York; that on November 12, 1937, an order was made by the Supreme Court of the State of New York, placing the company in rehabilitation; that, being insolvent, it was later placed in liquidation by that Court; that the plaintiff, Louis H. Pink, is the liquidator; that thereafter the plaintiff filed a report showing the condition of the company's affairs and the necessity of an assessment; that the New York Supreme Court thereupon entered an order adjudging an assessment against all members of the company, including all of the defendants herein; that plaintiff computed the amount due by each policy holder and the New York Court ordered each member during the year prior to November 10, 1937, including each defendant herein, to pay the amount assessed against him to the plaintiff; that in addition to the assessments, the New York Court ordered the members to pay the amount of other indebtedness due by them, to the plaintiff; that a certain stated sum is due by each defendant; that the action is in the nature of a creditor's bill instituted for the purpose of marshaling the assets of the insurance company, and that all monies collected by this proceeding will be merged with all other collections of liabilities, and will be distributed ratably among all the creditors of the company.

"It will thus be seen that the New York Court has already ascertained the indebtedness of the company, and has adjudicated the necessity for assessments against the members, as well as definitely fixing the amount due by each policy holder.

"The plaintiff's action is not one to determine the necessity for an assessment or the amount of it.

"The necessity and amount of assessment having been established in New York, the plaintiff, as statutory liquidator, has a cause of action in law against each of the policy holders for the amount due by each one upon his separate agreement."

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(That portion of the decree dealing with misjoinder of causes of action is omitted because not material here. The plaintiff's exceptions on this ground are also omitted.)

The defendants appeal upon two exceptions as follow:

"1. Because the Court erred in failing to sustain the demurrers on the ground that the plaintiff failed to state a cause of action, as it appears on the face of the complaint that the statutes of New York, applicable to the case, were not properly plead.

"2. Because the Court erred in not sustaining the demurrers on the ground that it appears on the face of the complaint that the plaintiff did not acquire jurisdiction of certain of the defendants for the reason that said defendants were not members and policyholders of the Auto Mutual Indemnity Company at the time said company was placed in liquidation."

Judge Henderson also granted two orders, dated June 15, 1940, and October 23, 1940, by which the place of trial of this action was changed to the counties of the residence of the defendants named in said orders. From these orders the plaintiff likewise appeals.

The Court is satisfied with the views expressed in the order of Judge Henderson. He gives "full faith and credit" to the orders of the New York Court. The Court of New York does not undertake to give judgment against these members of the company resident in South Carolina. It seeks by its agent, the liquidator of the Company, appointed by it, to collect the amounts assessed against the policy holders resident in this State by his action in the Courts of this State. The Circuit Order recognizes the

liquidator's right so to do, but it holds that plaintiff has exceeded his right when he assumes to sue all such policy holders in a joint action. He has erred by joining all of them in one action.

* * * * * * *

The order appealed from is affirmed. * * *.

Baker and Fishburne, JJ., and L. D. Li le and J. Strom Thurmond, Circuit Judges, AAJ., concur.

(3622)